

No. 91-353

Supreme Court, U.S.

FILED

SEP 27 1991

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1991

IN THE INTEREST OF A.E.H., a Person Under
the Age of 18:
C.C.,

Petitioner,

v.

P.C. and J.H.,

Respondents.

On Petition For A Writ Of Certiorari To The
Supreme Court Of The State Of Wisconsin

**BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WISCONSIN**

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QUESTIONS PRESENTED

1. Pursuant to 28 U.S.C. § 1738A and *Thompson v. Thompson*, 484 U.S. 174, 187 (1988), did the California court fail to accord Full Faith and Credit to the Wisconsin court's prior order when the Wisconsin action was the first action to be filed in accordance with the UCCJA?
2. Pursuant to 28 U.S.C. § 1738A and *Durfee v. Duke*, 375 U.S. 106, 111 (1963), did the California court fail to accord Full Faith and Credit to the Wisconsin court's prior order when it allowed the petitioner to collaterally attack the fact-finding of the first Wisconsin trial court even though the petitioner appeared in the Wisconsin proceeding and failed to appeal the Wisconsin court's ruling?

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STATEMENT OF THE CASE

H.H., a native of the state of Wisconsin, was murdered on February 23, 1986 in the state of California where she was stationed with the United States Navy. H.H.'s two non-marital children, A.E.H., age two and one-half years, and N.H., age four years, were born to separate fathers, neither of whom had established paternity. (Resp. App., pp. 5-6, 11). The Navy had no record of the fathers' identities or existence and, therefore, contacted H.H.'s relatives in Wisconsin, who were the only persons listed in Navy records as next of kin or persons to contact in the event of an emergency. (Resp. App., pp. 11-12, 14, 22-23). An uncle of the children arrived in California and presented California authorities with a copy of H.H.'s Will showing that she named her sister and brother-in-law, respondents P.C. and J.H., as guardians of her children. (Pet. App., p. 5a). Neither the California court nor A.E.H.'s uncle was aware of the identity of the father of either child. (Resp. App., pp. 12-13, 22, 27; Pet. App., pp. 38a-39a). In an Order dated February 26, 1986, the referee of the Santa Clara County (California) Juvenile Court dismissed the original petition commencing the juvenile court action, which had been filed the previous day, released the children to the custody of their uncle for return to the state of Wisconsin and set aside a jurisdictional hearing that was to have been held on March 14, 1986. (Resp. App., pp. 1-3; Pet. App., pp. 5a-6a). Over two weeks later, a man claiming to be the father of A.E.H., petitioner C.C., first made his presence known by appearing at the naval base and inquiring as to the whereabouts of H.H. (Pet. App., pp. 6a-7a).

The foregoing paragraph is representative of the many facts adverse to C.C. that he fails to present in his petition. It consists of facts established in Wisconsin proceedings, and relied upon by the Wisconsin Supreme Court in its determination that Wisconsin properly exercised and could continue to exercise jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA). C.C. chooses to present only the facts found by California courts.

United States Supreme Court Rule 15.1 requires a respondent to alert the Court to misstatements of fact and omissions contained in a Petition for Writ of Certiorari. That rule, as well as the interests of fairness, requires respondents to present an alternative statement of facts to alert the Court to the one-sided nature of petitioner's statement of the case.

As previously noted, neither the Navy nor California court officials had knowledge of C.C.'s existence or identity until after the children were released to their uncle and taken to Wisconsin. (Resp. App., pp. 12-13, 22; Pet. App., pp. 38a-39a). While C.C. states that this release, and the concomitant dismissal of the pending juvenile action in California, was based upon false or fraudulent misrepresentations by the Wisconsin relatives, neither California Courts of Appeal which reviewed this case asserted or relied on this finding. (Pet. App., pp. 40a-41a). The California trial court's finding was based on a belief that the Wisconsin relatives could have produced A.E.H.'s birth certificate. (Pet. App., p. 91a). In fact, the birth certificate was filed in California, not Wisconsin. (Resp. App., p. 13).

The Wisconsin courts found that respondents and the uncle who traveled to California to secure the children had no knowledge of the identity or whereabouts of the father of either child. (Resp. App., pp. 12-13, 27). Upon discovering that a man claiming to be the father of A.E.H. had contacted Navy officials, respondents attempted to serve him with notice of recently commenced Wisconsin guardianship proceedings. Although relying upon an address given by C.C. to police and military authorities almost three weeks after H.H.'s death, C.C. was not residing at that address, and personal service was not obtained until June, 1986. An investigation showed that C.C. had not lived at this address for at least four years. (Pet. App., pp. 6a-7a).

Following the February 26, 1986 dismissal of the California juvenile proceeding, P.C. and J.H. commenced guardianship proceedings in Wisconsin on March 17, 1986 to effectuate the provisions of H.H.'s Will. As previously noted, they had difficulty serving C.C. (Pet. App., p. 7a). Eventually he was tracked down, and appeared specially in these proceedings objecting to Wisconsin's jurisdiction. (Pet. App., p. 9a). C.C. filed a competing California action on April 1, 1986, belatedly seeking to establish his paternity and obtain custody of A.E.H. Wisconsin relatives of the decedent specially appeared and objected to California's jurisdiction. (Pet. App., p. 7a).

From this point on, petitioner's recitation of the parallel proceedings in Wisconsin and California is chronologically accurate. He continues, however, to omit important facts found by the Wisconsin courts. In particular, C.C. fails to refer to the detailed findings of fact made by the circuit court for Rock County (Wisconsin) to

support the appointment of P.C. and J.H. as guardians of A.E.H. and her half-brother, and to support its decision not to defer to the jurisdiction of the California courts.¹ (Resp. App., pp. 5-18).

In addition to rejecting C.C.'s allegations of fraud and misrepresentation by the Wisconsin relatives, the Wisconsin trial court also found that C.C. did not have a close relationship with A.E.H. prior to H.H.'s death. (Resp. App., pp. 7-8, 11-14, 27-28). He made no efforts to establish his paternity, he never materially contributed to the support of A.E.H., he lived over 400 miles away from A.E.H. and he had no contact whatsoever with A.E.H. for a one-year period during which A.E.H. was in Missouri with her maternal grandfather while her mother was on sea duty. (Resp. App., pp. 9-10, 17-18, 26). In the words of the guardianship court, the Honorable John H. Lussow, presiding, "C.C. has, at best, been only an occasional visitor of A.E.H. . . . C.C. does not have an intimate relationship with A.E.H." (Resp. App., pp. 17-18).

On the other hand, Judge Lussow found that H.H. and her children had maintained close ties with her family in Wisconsin, that P.C. and J.H. had provided financial assistance to H.H. prior to her death, that the children had adjusted well to life on the farm of P.C. and J.H. and that they were in regular, almost daily contact with other relatives, including two cousins in a similar age group. (Resp. App., pp. 8-10, 14-15).

¹ C.C. also fails to point out that P.C. and J.H. subsequently adopted A.E.H.'s brother. (Pet. App., p. 9a n.7). Thus, the decisions of the California courts would separate A.E.H. from her sibling.

He found that there was available in Wisconsin substantial evidence concerning the children's present and future care and that the children had significant connections with the state. (Resp. App., pp. 19-22). He found that they had been abandoned and that there was an emergency, and he found that California had declined to exercise its jurisdiction by dismissing the Santa Clara county juvenile proceedings and releasing the children for return to Wisconsin. (Resp. App., pp. 22-23). Based on these findings, Judge Lussow found that Wisconsin had jurisdiction under the UCCJA pursuant to Wis. Stat. § 822.03(1)(b)(c) and (d) (UCCJA as adopted by Wisconsin). (Resp. App., p. 19).

C.C.'s petition makes factual misrepresentations to this Court regarding his relationship to A.E.H. and her mother H.H. which conflict with evidence in the record. C.C. claims that he resided in California since before A.E.H.'s birth to the present. (Petition, p. 6). None of his appendix references supports this statement and it directly conflicts with the evidence at the paternity hearing where he stated that he was living in Texas around A.E.H.'s birth. (Resp. App., p. 30). Thus, at the time of H.H.'s death, A.E.H. could not have seen C.C. for at least one and one-half years of her two and one-half year life.

C.C. claims in his petition that he offered support for A.E.H. and offered to marry H.H., but was refused. (Petition, p. 7). The only evidence in the record that could be corroborated by someone other than the deceased mother was C.C.'s acknowledgement that when the mother had asked for support, he refused to pay (Resp. App., p. 32), and that when H.H. needed money for nursery school,

the respondents, not C.C., provided regular monthly payments. (Resp. App., p. 8). With regard to C.C.'s marriage proposal to H.H., C.C. was married to another woman after A.E.H. was born. (Resp. App., p. 30).

C.C.'s inference that he "could not confirm that his daughter was removed from the State of California until approximately three weeks later" (Petition, p. 7) is misleading. He was not aware of H.H.'s death until he came to see her almost three weeks after the murder. As soon as he arrived, he was informed of the death and, as soon as he inquired, was given the whereabouts of his daughter. (Resp. App., p. 31). Rather than contact the Wisconsin relatives regarding A.E.H., he gave a false address to the authorities and then filed a California action claiming that he did not know where A.E.H. was and that there was no action pending in another state. (Pet. App., pp. 6a-7a). If C.C. did not receive certain information about A.E.H., it is because he did not ask for it.

The guardian ad litem noted that C.C. always blamed others for his lack of a relationship with his daughter. (Resp. App., p. 33). He continues this practice in his petition to this Court.

C.C.'s petition notes that the California court later determined that the dismissal of the juvenile proceedings did not constitute a decision to decline jurisdiction. (Petition, p. 22). It must be emphasized, however, that this determination was subsequent to the dismissal of the California juvenile proceedings and after commencement of the Wisconsin proceedings and was not part of an appellate review of the juvenile court proceeding. (Pet. App., pp. 58a-59a, 40a-41a). In addition to arising long

after the jurisdictional dispute was evident, these *ex post facto* statements of intent were not made by the same judicial officer who signed the order dismissing the California juvenile proceedings. (Resp. App., pp. 1-3; Pet. App., pp. 58a-59a).

Following their appointment as guardians, P.C. and J.H. petitioned the Rock County (Wisconsin) circuit court to terminate C.C.'s parental rights. Judge Patrick Rude affirmed and adopted the jurisdictional findings made by Judge Lussow in the guardianship proceeding. C.C. was found to be the father of A.E.H. over three and one-half years after the child's birth. (Pet. App., p. 9a). Because the jury found no grounds to terminate C.C.'s parental rights, P.C. and J.H. commenced common law proceedings on June 19, 1987, to obtain custody pursuant to the standards set forth in *Barstad v. Frazier*, 118 Wis. 2d 549 (1984). (Pet. App., p. 11a).

In the meantime, C.C. requested the California paternity court to incorporate the Wisconsin paternity judgment and proceeded to obtain custody in that state. (Pet. App., pp. 7a, 11a-12a). Because two Wisconsin courts had upheld the jurisdiction of Wisconsin to determine this matter, P.C. and J.H. objected to California's jurisdiction, and appeared by counsel, not in person. (Pet. App., p. 7a). No guardian ad litem was appointed in the California proceeding. (Pet. App., pp. 38a, 47a, 55a, 58a). The California court refused to admit a psychological evaluation of the child performed by a Wisconsin psychologist. There was no independent testimony concerning the best interests of the child by anyone who had actually met with, and evaluated A.E.H. (Pet. App., pp. 49a-52a). P.C. and J.H. appealed the order awarding sole custody to

C.C. (Pet. App., p. 47a). Their unsuccessful appeals in California were not finally resolved until this matter was pending before the Wisconsin Supreme Court. (Pet. App., p. 54a).

When the Wisconsin custody action came before Judge Rude for determination, he took judicial notice of the California Court of Appeals decision affirming the award of sole custody to C.C., and reversed his earlier affirmance and adoption of Judge Lussow's jurisdictional findings. The Wisconsin custody action was dismissed, and P.C. and J.H. appealed to the Wisconsin Court of Appeals. (Pet. App., p. 12a). The Court of Appeals affirmed the circuit court's dismissal of the custody action. *In the Interest of A.E.H.*, 152 Wis. 2d 182 (Ct. App. 1989). (Pet. App., p. 77a).

Two issues were presented in that court. First, whether the guardianship and termination of parental rights proceedings were custody proceedings pursuant to the UCCJA. Second, whether Judge Rude was barred by *res judicata* from reconsidering his previously adopted findings of jurisdiction. The Wisconsin Court of Appeals found that while the guardianship and termination of parental rights proceedings were "custody" proceedings within the meaning of the UCCJA, the circuit court in the subsequent custody action was not precluded from redetermining jurisdiction because the lack of UCCJA jurisdiction in the two previous proceedings was so obvious as to constitute a "manifest abuse" of jurisdictional authority by those courts. (Pet. App., pp. 85a, 89a).

The Wisconsin Supreme Court reversed the Court of Appeals. *In the Interest of A.E.H.*, 161 Wis. 2d 277 (1991).

(Pet. App., p. 1a). While holding that the Wisconsin custody court had authority to consider its subject matter jurisdiction to modify the California order, the Supreme Court disagreed with the Court of Appeals that the previous findings of jurisdiction constituted a manifest abuse of authority. On the contrary, the Supreme Court held that the Wisconsin circuit court had jurisdiction under the UCCJA in all three proceedings, including the custody proceeding dismissed by Judge Rude. (Pet. App., p. 4a).

The Wisconsin Supreme Court concluded that custody proceedings under the UCCJA were commenced in Wisconsin on March 17, 1986 when respondents P.C. and J.H. filed a guardianship petition in Wisconsin. (Pet. App., p. 18a). The Court found two bases for jurisdiction at that time under the UCCJA. First, the Court found jurisdiction under Wis. Stat. § 822.03(1)(b) requiring that the child and at least one contestant must have a significant connection with the state, and that there must be available in the state substantial evidence concerning the child's present or future care, protection, training and personal relationships. The Supreme Court noted that on March 17, 1986 when the guardianship petition was filed, C.C. had never been adjudicated as the father and there were no known relatives in California. On the other hand, all of the child's then known relatives, including her brother, were present in Wisconsin on that date. (Pet. App., pp. 18a-20a).

Second, the Wisconsin Supreme Court found that California had declined jurisdiction, thus giving Wisconsin authority to proceed pursuant to Wis. Stat. § 822.03(1)(d). (Pet. App., pp. 21a-22a). In this regard, the

Supreme Court found unpersuasive the subsequent declarations of the California courts attempting to explain that the dismissal of the California juvenile proceeding was not a declination of jurisdiction. (Pet. App., pp. 21a-22a). Those explanations were not in existence at the time of the filing of the Wisconsin guardianship petition, nor were they made by the commissioner who dismissed the action. As stated by the Wisconsin Supreme Court: "We find much more persuasive the document filed on February 26, 1986, dismissing the original petition regarding placement of the child and releasing her to the custody of her uncle. This is the document which was in existence on March 17, 1986, the day the guardianship petition was filed in Wisconsin." (Pet. App., p. 22a).

Considering the existence of parallel proceedings in the State of California, the Wisconsin Supreme Court noted that no California proceedings were pending at the time that the Wisconsin guardianship proceedings were initiated on March 17, 1986, and cited authorities to support the principle of first in time as the basis for resolving such jurisdictional deadlocks. (Pet. App., pp. 25a-27a). The Wisconsin Supreme Court further concluded that Wisconsin was not an inconvenient forum and, therefore, had no reason to decline jurisdiction to California on the grounds of comity. (Pet. App., pp. 27a-29a).

The Wisconsin Supreme Court went on to find that each new custody proceeding under the UCCJA constitutes a modification proceeding pursuant to § 14 of the Act. (Pet. App., pp. 30a-31a). Because California had awarded sole custody to C.C. by the time P.C. and J.H. initiated the Wisconsin custody proceeding in front of Judge Rude, the Wisconsin Supreme Court determined

that the Wisconsin courts could proceed only if California had " 'lost' jurisdiction by not fulfilling the jurisdictional prerequisites of the UCCJA." (Pet. App., p. 34a).

The Wisconsin Supreme Court concluded that California had "lost" jurisdiction at the time the Wisconsin custody proceeding was filed on June 19, 1987. (Pet. App., pp. 34a-36a). At that time, California was no longer the home state. Indeed, the child, then age four, had been in Wisconsin for sixteen (16) months. (Pet. App., pp. 34a-36a). The Wisconsin Supreme Court concluded that the Wisconsin circuit court had jurisdiction under the UCCJA to modify the California custody decree, and therefore reversed and remanded to the Wisconsin circuit court for a custody hearing. (Pet. App., p. 37a).

ARGUMENT

I. THE ISSUE RAISED BY PETITIONER IS NOT RIPE FOR CONSIDERATION BY THIS COURT.

A. There Is No Clear Present Conflict Between The Wisconsin And California Courts On The Issue Of Wisconsin's Jurisdiction To Modify The California Order.

Petitioner argues that the Wisconsin Supreme Court's determination that Wisconsin has sole jurisdiction to modify the California order creates a conflict between two state courts. This is incorrect. First, California has never addressed whether California or Wisconsin has jurisdiction to modify the existing California order. Modification jurisdiction is a separate determination from initial jurisdiction. 28 U.S.C. § 1738A(c) and (g). Since we

do not know how California would rule on the issue of modification jurisdiction, there is no clear conflict on this issue.

Second, the Wisconsin Supreme Court's decision simply did not raise a Full Faith and Credit issue. The Wisconsin Supreme Court expressly stated that it did not address the validity of the California order. (Pet. App., p. 32a). It rested its decision on whether Wisconsin could modify that order in accordance with 28 U.S.C. § 1738A(f). (Pet. App., pp. 36a-37a).

The Wisconsin Supreme Court concluded that at the time the modification request was made, not only had Wisconsin become the child's home state, but California had lost jurisdiction in the intervening period of time. It based this conclusion on the then current facts in light of the relevant provisions of the Uniform Child Custody Jurisdiction Act as adopted by both California and Wisconsin. (Pet. App., pp. 34a-37a). In that analysis, it was clear that, at the time of the modification, Wisconsin had the greater contacts with the child and child's family, including her brother who had been adopted by the respondents.

The Wisconsin Supreme Court also reaffirmed the finding of the first Wisconsin circuit court that California had declined jurisdiction on February 26, 1986, by dismissing the juvenile court proceeding. (Pet. App., p. 22a). This finding negates the impact of California being the home state on that date. 28 U.S.C. § 1738A(c)(2)(D)(i); *Thompson v. Thompson*, 484 U.S. 174, 177 (1988); Wis. Stat. § 822.06(1). Since California had declined to exercise jurisdiction, Wisconsin was free to exercise jurisdiction

because the child was present in Wisconsin and home state analysis is irrelevant.

The petitioner continues to ignore that this finding had to be based on facts known at the time the Wisconsin action was filed on March 17, 1986. *Thompson*, 484 U.S. at 177. The *ex post facto* findings of "intent" by the California courts are irrelevant.

It is irrelevant that a California trial court, that was not even involved in the initial California action that was dismissed, came to a contrary conclusion seven months later in a letter to a different California trial court. The fact that the California courts continued to exercise jurisdiction contrary to the UCCJA is also irrelevant to the finding of fact made by the Wisconsin court as of March 17, 1986. Neither the judge's letter nor the continued exercise of jurisdiction was a part of the normal appeal and review process from the first commissioner's order dismissing the California case and allowing the children to move to Wisconsin.

As will be discussed later in this Brief, the Full Faith and Credit Clause was violated in this case by the California courts refusal to honor the prior Wisconsin order, not by the Wisconsin Supreme Court's determination that Wisconsin has jurisdiction to modify the California order.

This Court should not grant the petition based on the issue of modification jurisdiction since there is no clear conflict that must be resolved on this issue. *Poe v. Ullman*, 367 U.S. 497 (1961). The petitioner is asking this Court to assume that the California courts will refuse to give Full Faith and Credit to a Wisconsin order modifying the California order. The California courts' past refusal to

accord Full Faith and Credit to the Wisconsin order was not a result of the decision of the Wisconsin Supreme Court which is before this Court. Therefore, the Wisconsin Supreme Court's decision raises no error that requires review by this Court.

B. The Supreme Court Traditionally Avoids Involvement In State Court Family Law Matters And In Fact-Finding.

If this Court reviews the Wisconsin court's finding of modification jurisdiction, it not only will discover that there is no clear interstate conflict, but that the petitioner is requesting this Court to usurp the role of the fact-finder in a state court case.

When a state trial court determines jurisdiction to modify another state's court order, it makes a fact-based determination in light of the relevant factors of the UCCJA and 28 U.S.C. § 1738A. *Thompson*, 484 U.S. at 186 n.4. Such a fact-based determination is subject to review on appeal by that state's appellate court only as to whether the facts are clearly erroneous, or whether the facts, if true, are sufficient to support the court's determination as a matter of law. Wis. Stat. § 805.17(2).

The U.S. Supreme Court has traditionally avoided involvement in domestic cases because they involve an area of uniquely state concern. *Thompson*, 484 U.S. at 185-87; *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). In addition, the U.S. Supreme Court traditionally has refused to correct factual errors of the state supreme courts, and affirmatively declined to do so in *Thompson*. 484 U.S. at 186-87.

A comparison of the one-sided California facts selectively cited by the petitioner with the facts found by the first Wisconsin circuit court and approved by the Wisconsin Supreme Court, reflects the fact-based nature of these determinations. The proper remedy for the petitioner if he did not agree with the first Wisconsin circuit court's fact findings was to appeal to a Wisconsin appellate court and argue that such findings were clearly erroneous. Wis. Stat. § 805.17(2). C.C. never appealed the determination of the Wisconsin guardianship court finding UCCJA jurisdiction. When, several months later, and after a second Wisconsin proceeding had been commenced, C.C. proceeded in federal court, the district court directed him to exhaust his state remedies first. *Crouse v. Creanza*, 658 F. Supp. 1522, 1529 (W.D. Wis. 1987). He had failed to do so.

Instead, he went to California and relitigated some of those same facts, and collaterally attacked the Wisconsin court's factual findings. He now asks this Court to approve the selective California fact-finding that he presents, when the Wisconsin court he is challenging relied on very different facts – facts he chose not to challenge on direct appeal.

The U.S. Supreme Court is not a fact-finder for state courts. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). If this Court accepts this petition for the purpose of reviewing the Wisconsin court's determination of modification jurisdiction, it is in effect acting as such a fact-finder and error correcter. Then the question presented will be: Why should this Court accept the California court's fact-findings rather than the Wisconsin court's fact-findings?

As discussed later in this Brief, this Court has provided appropriate touchstones for review of these cases that do not involve second guessing the fact-finding of the Wisconsin circuit court as approved by the Wisconsin Supreme Court.

The issue raised by the petitioner does not raise a Full Faith and Credit problem and does not present a clear conflict between two state courts. Instead, the petitioner asks the U.S. Supreme Court to act as a fact-finder between two state courts and to correct factual errors of one of them. The petition should not be granted on this basis.

II. THE REAL ISSUE FOR THIS COURT TO REVIEW IS THE CALIFORNIA COURTS' FAILURE TO ACCORD FULL FAITH AND CREDIT TO THE WISCONSIN COURT'S PRIOR DECISION.

A. The Petitioner Has Misstated The Issue.

The real issues the Court must address if it grants the petition are whether:

1. Contrary to *Thompson v. Thompson*, 484 U.S. 174, 187 (1988), California failed to accord Full Faith and Credit to the Wisconsin court's prior order when the Wisconsin action was the first action to be filed in accordance with the UCCJA; and whether,

2. Contrary to *Durfee v. Duke*, 375 U.S. 106, 111 (1963), California failed to accord Full Faith and Credit to the Wisconsin court's prior order when it allowed the petitioner to ignore, and thus, collaterally attack, the fact-finding of the

first Wisconsin circuit court even though the petitioner appeared in the Wisconsin proceeding and failed to appeal the Wisconsin court's ruling.

At the time that the California Supreme Court denied review of the California Court of Appeals' decision, the Wisconsin Supreme Court had not yet reversed the Wisconsin Court of Appeals' decision which was in accord with the California decision. Thus, during the relevant time for filing a Petition for a Writ of Certiorari from the California Supreme Court decision, there was no conflict between state courts, and thus no basis for this Court to exercise its jurisdiction.

The Wisconsin Supreme Court has since determined that it has jurisdiction to modify the California order. That determination was based in part on its affirmance of the initial Wisconsin circuit court's findings that California had declined jurisdiction and that Wisconsin had more significant contacts. Thus, this Court must review that initial Wisconsin circuit court's determination of its jurisdiction in March, 1986. In doing so, it will review the failure of the California trial court to honor the Wisconsin court's fact-finding and order contrary to the Full Faith and Credit Clause, Article IV, § 1 of the United States Constitution.

B. Contrary To *Thompson v. Thompson*, California Failed To Accord Full Faith And Credit To The Wisconsin Court's Prior Order When The Wisconsin Action Was Filed Before The California Action In Accordance With The UCCJA.

Although the relevant state statutes adopted by California and Wisconsin are in accord with the Uniform

Child Custody Jurisdiction Act, the relevant federal statute in this area is 28 U.S.C. § 1738A, popularly known as the Parental Kidnapping Prevention Act (PKPA). This federal statute was intended to fill the gaps in those states which had not adopted the UCCJA in their state's statutory scheme and to address some inconsistencies in state statutes in this area. *Thompson*, 484 U.S. at 181. To the extent the provisions of the state statute conflict with the PKPA, the PKPA governs. *Sams v. Boston*, 384 S.E.2d 151, 156 (W. Va. 1989); *Murphy v. Woerner*, 748 P.2d 749, 750 (Alaska 1988).

In this case, the PKPA does not conflict with the relevant provisions of the UCCJA. The Wisconsin Supreme Court found that the Wisconsin circuit court had properly exercised its jurisdiction in accordance with the UCCJA and the PKPA.

The Wisconsin circuit court found that at the time the Wisconsin guardianship action was filed on March 17, 1986, the facts were as follows:

1. There was no other action pending in any other state. (Pet. App., p. 22a).
2. The state which had home state jurisdiction had dismissed its action, had cancelled a jurisdictional hearing and released the children to relatives in Wisconsin, knowing that they were going to Wisconsin and that a Wisconsin court would be addressing guardianship proceedings. (Pet. App., pp. 5a-6a; Resp. App, pp. 1-3).
3. The respondents did not in any manner obtain custody of the children through fraud or

misrepresentation. (Resp. App., pp. 7-9, 11-14, 27-28).

4. No person had been adjudicated the father of A.E.H. (Resp. App., p. 25).

5. Most of the child's known relatives, including her half-brother with whom she had lived her entire life, were in Wisconsin. (Resp. App, pp. 19-21).

6. The respondents, who were named as guardians of both children by the mother in her Will, resided in Wisconsin. (Resp. App., pp. 10-11, 14).

7. The children had spent time with the Wisconsin relatives both in Wisconsin and in California. (Resp. App., pp. 6-10).

8. A person claiming to be the father of A.E.H. had not made his identity or existence known until he showed up at the naval base almost three weeks after the mother's death. (Resp. App., pp. 12-13, 26).

Eight days after filing the petition for guardianship in the Wisconsin circuit court, the respondents attempted service on the petitioner at the address he had given the officer at the naval base. One week after this attempt, notice by publication appeared in the area where the petitioner had claimed residence. At the same time, the county sheriff attempted personal service upon the petitioner at this same address. Finally, on June 20, 1986, the petitioner received notice by express mail, return receipt requested.

It was later discovered that the address that the petitioner had given the police and military authorities

on March 14, 1986 had not been his residence for at least four years. (Pet. App., pp. 6a-7a).

Under the UCCJA, personal service is not required and the publication of notice when other means had failed complied with the service requirements of UCCJA, Wis. Stat. § 822.05(1).

While the petitioner was avoiding service of the Wisconsin action, he filed an action in California claiming that there was no other action pending related to the child and that he did not know who had physical custody of the child. However, he served notice of his action to the Wisconsin relatives on May 6, 1986. (Pet. App., p. 7a).

In *Thompson*, 484 U.S. at 177, this Court concluded that the first state in which an action is filed in accordance with the provisions of the PKPA assumed jurisdiction over competing claims of other states where actions were subsequently filed. Aside from the fact that the California juvenile action was dismissed, petitioner acknowledges that this first California action did not provide adequate notice. (Petition, p. 22).

At the time the Wisconsin court exercised jurisdiction, there was no other action pending and proper notice was given to all parties. The California court had declined to exercise jurisdiction when it dismissed its action and sent the children to Wisconsin knowing that a guardianship proceeding would be commenced in Wisconsin. (Resp. App., pp. 1-3, 18-19, 23-24; Pet. App., pp. 5a-6a, 22a). This is all that is required by the PKPA and *Thompson* for valid exercise of jurisdiction by the Wisconsin court.

This Court has emphasized that it does not want to become embroiled in these state battles and has supported the "first-in-time" filing rule in *Thompson*. This rule eliminates the need to second-guess the fact-finding of two different state courts in resolving a jurisdictional battle. This rule emphasizes that the facts are to be determined at the time of the *filing*, not the time of service or any other time.

Since Wisconsin meets the "first-in-time" rule under *Thompson*, there is no need to review the Wisconsin Supreme Court's decision that Wisconsin, in addition to exercising initial jurisdiction properly, also has jurisdiction to modify any California order that may exist.

C. Contrary To *Durfee v. Duke*, California Failed To Accord Full Faith And Credit To The Wisconsin Court's Prior Order When It Allowed The Petitioner To Collaterally Attack The Fact-Finding Of the Wisconsin Trial Court Even Though The Petitioner Appeared In The Wisconsin Proceeding And Failed To Appeal The Wisconsin Court's Ruling.

In *Durfee v. Duke*, 375 U.S. 106, 112 (1963), this Court held that a state court violates the Full Faith and Credit Clause when it redetermines another tribunal's determination of subject matter jurisdiction after the same parties have litigated the issue in the first tribunal.

In *Durfee*, the Nebraska court had determined that it had jurisdiction to determine title to a tract of land that each party claimed was in a different state. After fully litigating the factual issues necessary for the Nebraska

court to resolve the jurisdictional issue, the losing party filed an action related to the same property in a Missouri state court, claiming that the property was in Missouri and the Nebraska court did not have jurisdiction to decide that issue. This Court in *Durfee* concluded that the fact of whether the property was in Nebraska or Missouri could not be relitigated and the issue of the Nebraska court's jurisdiction could not be relitigated without violating the Full Faith and Credit Clause.

Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it. *Durfee*, 375 U.S. at 109.

The Wisconsin court made factual findings necessary under the UCCJA, consistent with the PKPA, that, if made by a California court, would have been given full *res judicata* effect. All parties participated in that proceeding and the petitioner could have requested a review of that proceeding in Wisconsin. It is clear that the California court would have given the findings of the Wisconsin order as of March 17, 1986 *res judicata* effect had they been made by a California court.

The Court in *Durfee* noted that in *Davis v. Davis*, 305 U.S. 32 (1938), a divorce case, where the original court made a factual determination of domicile in order to determine whether it had subject matter jurisdiction to grant a divorce, the subsequent forum could not relitigate the issue of domicile in order to redetermine the issue of jurisdiction. *Durfee*, 375 U.S. at 112, 113.

By allowing the petitioner to collaterally attack the Wisconsin court's findings of fact, the California court acted contrary to 28 U.S.C. § 1738A(g), an addendum to the Full Faith and Credit Statute, which states:

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

Since Wisconsin had made the factual findings necessary to conclude that it had jurisdiction under the UCCJA and PKPA, the California court could not redetermine those facts. However, the California court did redetermine those facts, reached different conclusions about those facts, and concluded that Wisconsin was not exercising jurisdiction consistently with the provisions of the UCCJA. Had it adopted the Wisconsin court's facts, it could not have reached such a conclusion.

Despite the clear policy of the UCCJA and PKPA to prevent multiple litigation, the California trial court allowed the petitioner to challenge the Wisconsin facts in California, and to obtain review of those facts by a California appellate court which appeared unconcerned that a Wisconsin circuit court had previously found contrary facts. The petitioner's attempts to ignore the original fact-finding by the Wisconsin circuit court continue as he failed to include this decision in his appendix and failed to acknowledge most of the facts found by the Wisconsin court which conflicted with those of the California court.

The California court's willingness to redetermine whether Wisconsin had jurisdiction violated the Full Faith and Credit Clause and is contrary to this Court's holding in *Durfee v. Duke*. If this Court grants certiorari in this case, the respondent respectfully requests that it address this issue.

III. IT IS IN THE BEST INTERESTS OF THE CHILD TO ALLOW THE WISCONSIN COURT'S DECISION TO STAND.

This Court has acknowledged that a jurisdictional determination under the PKPA may turn on the child's "best interests". *Thompson*, 474 U.S. at 186 fn. 4. Indeed, it is the overriding principle to be applied by courts in exercising their jurisdiction under the UCCJA and PKPA.

If this Court grants this petition, a review of the record will reveal that only the Wisconsin courts have considered this child's best interests at any juncture. In California, no guardian ad litem was appointed to represent the child in any proceeding. At the California "custody" trial there is nothing in the record showing testimony by anyone who had spoken with the child since her mother's death or by any professional who had ever spoken with or seen the child. When the respondents' California counsel moved to admit the deposition of the child's Wisconsin psychologist who had seen her and her brother soon after arriving in Wisconsin and who continued to treat the children, the California court denied its admission even though C.C. had been represented at the deposition. (Pet. App., pp. 49a-51a). The California court order only provides that visitation with

the respondents and A.E.H.'s brother will be worked out after the child is in California. (Pet. App., pp. 56a-57a).

This child was two and one-half years old when her mother was murdered. She is now eight years old. Her now ten-year-old brother is the only person she has lived with her entire life. That brother has been adopted by the respondents and will remain in Wisconsin. The California court saw no need to consider testimony by anyone who actually knew this child, or by anyone who could testify about the impact of losing her brother immediately after losing her mother. We can only assume that the California court has even less concern about these matters now.

The PKPA and the UCCJA require courts to apply the overriding standard of the best interests of the child in rendering their decisions. They are not to consider the best interests of an adult who was a stranger to this child, and who had never bothered to be adjudicated the father or to pay child support. Only the Wisconsin court has applied the best interests of the child standard in determining its jurisdiction. (Resp. App., pp. 19-25). Only the Wisconsin court has demonstrated that in a custody determination it would protect the child's interests with the appointment of a guardian ad litem.

In Wisconsin, the standard to be applied in custody matters between relatives and a parent is stated in *Barstad v. Frazier*, 118 Wis. 2d 549, 568 (1984). The court may award custody to the relative if the parent is unfit, is unable to care for the child or if there are compelling circumstances to justify awarding custody to a non-parent. Because the biological parent's rights are not being terminated, the law applies a lesser standard in custody

cases than in termination of parental rights cases. In California, the trial court made its findings that there would be no detriment to the child to live with her father without taking any testimony by anyone who had even met with this child or observed her living situation with the respondents and her brother in Wisconsin. (Pet. App., pp. 51a-52a). There has been no fully litigated custody proceeding.

Petitioner cites *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53-54 (1989), for the proposition that this Court may ignore the impact of the change in custody on this child. In *Holyfield*, the Court was applying a specific federal statute which presumes that it is in the best interests of Indian children to have their custody and placement determined by tribal courts. *Id.* at 33 and 37. Thus, the best interests of those children had been decided by Congress.

That is simply not the case in applying the PKPA and UCCJA, where trial courts have an affirmative duty to consider the best interests of the children in deciding their jurisdiction. These statutes recognize that more than one state may have jurisdiction at a time. 28 U.S.C. § 1738A(c); Wis. Stat. § 822.03 and Wis. Stat. § 822.06. That is why the "first-in-time" rule and the overriding concern of the best interests of the child govern in these cases.

If this Court were to review the case, it would be required to consider whether the best interests of the child will be served by litigating custody in Wisconsin or California. While this Court might reach its conclusion by a different route than either the Wisconsin or the California courts, it would find that the best interests of this

child are clearly served by litigating custody in Wisconsin rather than California.

By denying the petition and allowing the Wisconsin Supreme Court's decision to stand, this Court will be reaching the same result.



CONCLUSION

The Wisconsin Supreme Court correctly decided that Wisconsin could modify the California order, and could have reached the same result on grounds that the first California court declined jurisdiction and that the petitioner is precluded from collaterally attacking the fact-finding of the first Wisconsin circuit court.

The Petition for a Writ of Certiorari to review the Wisconsin Supreme Court's decision on the issue of modification jurisdiction should be denied because it does not present a clear conflict between two state courts, it requests this Court to act as an arbiter of facts between two state courts, it does not raise the real issues the Court will have to decide if it grants the petition and, most importantly, because it is contrary to the child's best interests.

I am authorized to inform the Court that the Guardian ad Litem for A.E.H. approves of and joins in this Brief in Opposition.

Respectfully submitted,

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September 27, 1991

App. 1

For the County of Santa Clara
JUVENILE COURT

In Behalf of A.E.H.

Petition No. 90565

Birth Date: August 2, 1983

Age: 2

FINDINGS AND ORDER
OF REFEREE

Proceedings were had before me as Referee of this Court
on this date.

Present: ___ Minor
 ___ Mother
 ___ Father
 ___ Ex parte

Clerk J. Elliott

Court Officer C. Shields

Court Reporter B. Navarro

District Attorney D. Soares

Public Defender _____

Uncle; Naval Officer

- Parties present advised of their Constitutional Rights
and the nature of the Juvenile Court proceedings.
- Parties knowingly, intelligently, and voluntarily
waived Constitutional Rights.
- Attorney(s) stipulated to Referee Hearing.
- Original ___ Supplemental Petition(s) filed _____
read and explained.
- Evidence was heard and considered.

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THE COURT FINDS:

- ☒ Notice of this Hearing was given to all necessary persons.
- ☐ The allegations of the Section 300a Petition filed ___, are sustained.
- ☐ Minor is a person as described by Section 300a of the Welfare and Institutions Code.

THE COURT ORDERS:

- ☒ Minor released from the Children's Shelter to the custody of the uncle, effective _____.
- ☐ Probation Officer to arrange for transportation of minor to State of legal residence, _____; minor to be released from custody when travel arrangements are made.
- ☐ Juvenile Probation Department to pay for transportation of minor and apply to appropriate agency for reimbursement.
- ☒ Original ___ Supplemental Petition filed February 25, 1986 is dismissed.
- ☒ Jurisdictional Hearing date of March 14, 1986, III is set aside.
- ☐ Off Calendar.
- ☐ Case Dismissed.
- ☐ _____
- ☐ _____
- ☐ _____

I hereby report my findings and order to the Presiding Judge of the Juvenile Court and certify that I have

App. 3

caused a copy to be served on each parent or guardian of the minor as set forth in the Petition on file herein.

Dated February 26, 1986 Kristine Mackin McCarthy
KRISTINE MACKIN MCCARTHY
REFEREE OF THE JUVENILE COURT

Section 252 of the Welfare and Institutions Code reads as follows:

At any time prior to the expiration of 10 days after service of a written copy of the order and findings of a referee, a minor of his parent or guardian may apply to the juvenile court for a rehearing. Such application may be directed to all or to any specified part of the order or findings, and shall contain a statement of the reasons such rehearing is requested. If all of the proceedings before the referee have been taken down by an official reporter, the judge of the juvenile court may, after reading the transcript of such proceedings, grant or deny such application. If proceedings before the referee have not been taken down by an official reporter, such application shall be granted as of right. If an application for rehearing is not granted within 20 days following the date of its receipt, it shall be deemed denied. However, the court, for good cause, may extend such period beyond 20 days, but not in any event beyond 45 days, following the date of receipt of the application, at which time the application for rehearing shall be deemed denied unless it is granted within such period.

FINDINGS AND ORDER OF REFEREE

App. 4

STATE OF WISCONSIN CIRCUIT COURT ROCK COUNTY

In the Matter of the
Guardianship of:
N.J.H. AND A.E.H.,
Alleged Minors.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECREE OF
JURISDICTION AND
CONVENIENT FORUM

Case No. 86 GN 34

The objection of C.C., appearing specially by his attorneys, James E. Welker and Peter B. Kelly, BRENNAN, STEIL, RYAN, BASTING & MacDOUGALL, S.C. to the Circuit Court of Rock County taking jurisdiction of the above child custody matter having come on for hearing before the Honorable John H. Lussow, Circuit Judge, Probate Branch, Rock County Circuit Court at the Courthouse in Janesville, Wisconsin on the 6th day of May, 3rd day of June, and 17th day of June, 1986, C.C. having appeared specially by said Attorney James E. Welker on the 6th day of May and 17th day of June, 1986 and by said Attorney Peter B. Kelly on the 6th day of June, 1986, the petitioners in the above entitled guardianship matter, P.C. and J.H. having appeared in person and by their Attorney Richard C. Kelly, MEALY & KELLY on each of said hearing dates, the above named minor children having appeared on each of the above hearing dates, and by their Guardian ad Litem, Attorney Daniel T. Dillon of Janesville, Wisconsin on the 17th day of June, 1986; and the Rock County Circuit Court having had on each of the beforementioned hearing dates a telephone conference with the Honorable Frank O. Tettley, Commissioner for the Superior Court of California, San Bernadino [sic] County, West District, Ontario, California, before whom

there appeared in said Superior Court in Ontario at each of said telephone conferences, C.C. and by his Attorney Beverly Jean Gassner, GASSNER & GASSNER of Ontario, California; and Attorney Elizabeth Goodley of GARRY, McTERNAN, STENDER, & WALSH of San Jose, California appeared specially for P.C. and J.H. and objected to the jurisdiction of the Superior Court of California for the County of San Bernadino over the paternity action commenced by C.C. on April 1, 1986, Superior Court Case No. OCV 38045, and the guardianship action commenced by C.C., Superior Court Case No. GW 865; and the above Circuit Court of Rock County, Wisconsin having reviewed the Affidavits and Briefs herein on file, having heard the arguments of counsel, having conferred orally by telephone conference with said Commissioner Frank O. Tetley, and having heard the arguments of California counsel, and being fully informed of the facts of this matter, now makes the following Findings of Fact, Conclusions of Law and Decree of Jurisdiction and Convenient Forum:

FINDINGS OF FACT

1. Both of the above named minor children, N.J.H. and A.E.H. were born in San Diego, San Diego County, California, out of wedlock to H.H. Said minor child N.J.H., hereinafter called N.J.H., was born on March 24, 1982. Said minor child A.E.H., hereinafter called A.E.H., was born on August 2, 1983. The children were fathered by different putative fathers. No paternity judgments concerning either of said minor children have ever been entered in any state.

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2. H.H., the mother of the said minor children, hereinafter called H.H., was born in Whitehall, Wisconsin on February 27, 1962. H.H. was one of four children born to the marriage of J. and M.H. In 1963, the family moved to Green Bay, Wisconsin. The children of the family all attended school in Green Bay and graduated from high school in Green Bay. At the time that H.H. joined the Navy, she was a resident of Green Bay, Wisconsin. She entered the Navy on April 1, 1981 in Milwaukee, Wisconsin.

3. All of the [sic] H.H.'s siblings [sic], except for T.T., who is in the military service living in Tuscon [sic], Arizona, reside in the State of Wisconsin. H.H.'s sister, J.H. lives with her husband, P.C., on a farm in the Town of Lima, Rock County, Wisconsin. Another sister of H.H., S.K., lives in Whitewater, Wisconsin, with her husband, J.K. S.K. and her husband have two children, B., age 4 years, and E., age 3 months old. H.H.'s brother, J.H., Jr., also lives in Green Bay, Wisconsin. H.H.'s mother, M.P.P., lives in Green Bay, Wisconsin. H.H.'s father, J.H., Sr., also lives in the Midwest, but in Macon, Missouri.

4. At the time of N.J.H.'s birth on March 24, 1982, H.H. was living in a two bedroom apartment at 200 Catalina Blvd., San Diego, California 92147, which she shared with another woman. The other woman was a member of the United States Navy and was being shipped to Hawaii. As H.H. could not, alone, afford the rent for that apartment, she, shortly after N.J.H.'s birth moved with N.J.H. to 3541 Kenora Drive, Apartment B6, Spring Valley, California 92077. In 1983, H.H. and N.J.H. moved to 3522 College Avenue, Apartment 6, San Diego, California 92115, where she and N.J.H. resided at the time

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that A.E.H. was born on August 2, 1983. In April of 1983, H.H.'s two sisters, J.H. and S.K., and S.'s daughter, B., visited H.H. and N.J.H. in San Diego, California. S.K. and her daughter stayed one week, but J.H. stayed two weeks. During this visit, H.H. never informed either of the two said sisters that she was again pregnant; nor were they introduced to any boyfriends of H.H.

5. A.E.H. was born on August 2, 1983. On or about August 7, 1983, M.P.P., H.H.'s mother, traveled to San Diego to assist H.H. and her two children. Mrs. P. stayed approximately one month, during which period, she, H.H., and the two children visited the parents of C.C. C.C.'s parents lived in the San Diego area some distance from H.H.'s apartment. Mrs. P. was not familiar with San Diego and is not now familiar with the San Diego area. Mrs. P. did not know the address of C.C.'s parents at the time she visited their home and does not know it now. At the time that Mrs. P. visited C.C.'s parents, C.C. was not present. Mrs. P.'s visit to the home of C.C.'s parents lasted three to four hours. Sometime later in August of 1983, Mrs. P. met C.C. C.C. had come to visit H.H. at H.H.'s apartment. Mrs. P. was introduced to C.C. and was in his presence for approximately twenty minutes to one-half hour before Mrs. P. retired for the evening. Mrs. P. never saw or communicated with C.C. or his parents again. Mrs. P. would not recognize C.C. if she saw him again today. H.H. at the time had told Mrs. P. that she had no intention of marrying C.C., because she did not like the way C.C. treated N.J.H. H.H. said that C.C. had no affection for N.J.H. and did not enjoy N.J.H.'s company. Mrs. P. was not aware that C.C. or his parents had any continuing interest in A.E.H. after August of 1983. Mrs. P.

had no contact with either C.C. or his parents after August of 1983. Prior to the commencement of the above guardianship action, Mrs. P. never discussed with any of her other daughters or her sons-in-law the dinner she had with C.C.'s parents, or the brief meeting she had with C.C. On February 24, 1986, Mrs. P. would have had no recollection of C.C.'s last name or the last name of his parents or their addresses. If J.K. had asked her to identify the fathers of the two said minor children, she would not have been able to give him the last names of either putative father, nor would she have been able to give him any addresses of such fathers or their parents.

6. When the maternal grandmother, M.P.P., returned from California in early September of 1983, she brought N.J.H. with her. N.J.H. stayed in Green Bay for approximately one week to ten days. N.J.H. then stayed at the farm of his aunt and uncle, P.C. and J.H., in the Town of Lima, Rock County, Wisconsin for approximately one month. On April 14, 1983 the aunt, J.H., returned to California with her nephew, N.J.H. J.H., believing N.J.H. to be at an age when he needed the company of other children his own age, enrolled N.J.H. in a nursery school near his mother's base in California. Because H.H. was not able to afford the nursery school, J.H., during the period of November, 1983 through April, 1984 sent the sum of \$220.00 per month to H.H. to cover the cost of the nursery school.

7. In December of 1983, H.H. and her two children moved to a larger apartment at 1455 Elder Avenue, Apartment A. Imperial Beach, California 92154. H.H. and the children shared the new apartment with H.H.'s boyfriend, a person by the name of Jeff (last name unknown).

In the Spring of 1984, H.H. was advised by the U. S. Navy that she would be stationed on the U.S.S. Ajax for one year; and that she would have to find other living arrangements for her children during that year. On May 1, 1984, H.H. and the two children flew to Kansas City, Missouri, where they were picked up by the maternal grandfather, J.H., Sr., and his wife, and driven to Macon, Missouri, where the maternal grandfather resided. H.H. stayed in Macon, Missouri with the children for two weeks before she reported to the U.S.S. Ajax. The children, N.J.H. and A.E.H., then resided with their maternal grandfather in Macon, Missouri for a full year.

8. Nine times during the course of that year, May 1, 1984 to May 1, 1985, the maternal grandfather and his wife traveled to Whitewater, Wisconsin to have the children visit with their two sets of aunts and uncles in Whitewater and their cousin, B. The maternal grandfather did this for the purpose of having the children become fully acquainted with the rest of the family. That summer, in fact, the maternal grandfather, his wife and children spent a ten day vacation in Wisconsin at the farm of the petitioners, P.C. and J.H. As a result, N.J.H. and A.E.H. were fully familiar with the farm surroundings when they returned to Wisconsin in February of 1986.

9. During the full year that the maternal grandfather had custody of N.J.H. and A.E.H. neither child received any contact from any person claiming to be the putative father or fathers or putative paternal grandparents of the children. The birthdays of both N.J.H. and A.E.H. passed without either child receiving any message or present from any alleged putative parent or putative paternal grandparent; and Christmas of 1984 passed

without either child receiving any messages or gifts from any alleged putative fathers or putative paternal grandparents.

10. On or about May 1, 1985, H.H. finished her tour on the U.S.S. Ajax and returned to Macon, Missouri, where she reacquainted herself with her children for approximately 2 weeks before returning with them to California.

11. Upon returning to California, H.H. and the children lived at 660 Tyrella Avenue, Apartment 36, Mountainview, California 94043. On or about October 1, 1985, H.H. and the children moved to 1593 Quebec Court, Apartment 6, Sunnyvale, California 94087.

12. H.H.'s family remained in frequent contact with N.J.H. and A.E.H. after the return to California in May of 1985. The maternal grandfather telephoned at least weekly and spoke with the children; and J.H. telephoned and spoke with the children on several occasions during the same period. Both maternal grandparents sent gifts to A.E.H. for her second birthday. Both maternal grandparents and J.H. and P.C. sent presents to the two children for Christmas, 1985.

13. J.H., petitioner, is thirty (30) years of age. She is married to P.C. Her educational background is as follows: she attended UW-Whitewater (Major in Special Education); Gateway Technical Institute, Kenosha (Associate Degree in Horticulture). The petitioner, P.C., is thirty-four (34) years of age. His educational background is as follows: He attended Western Illinois University (Animal Science). The petitioners, J.H. and P.C. have no children

of their own. They reside on a farm in the Town of Lima, Rock County, Wisconsin, farming approximately Two Hundred (200) acres and raising approximately Seventy (70) head of sheep. P.C.'s family also lives on County Line Road in the Town of Lima, Rock County, Wisconsin. The C. family has owned the farm in the Town of Lima for approximately Thirty-five (35) years.

14. In late 1985, or early 1986, H.H. and the two children moved to 100 North Whisman Road, Apartment 150, Mountainview, California 94043, where she and the children lived with H.H.'s then lover, J.B.

15. Throughout the years that H.H. was in the Navy, she had various and numerous lovers. Her involvement with men was promiscuous.

16. On February 23, 1986, H.H. was killed by a gunshot wound to the head at 100 North Whisman Road, Apartment 150, Mountainview, California. The children were taken into custody by the Juvenile Court of Santa Clara County, California and placed in separate foster homes in Santa Clara County. A murder investigation following her death was made by the civilian and military authorities in Santa Clara County.

17. On the morning on [sic] February 24, 1986, two U. S. Naval Officers visited the home of M.P.P., H.H.'s mother, and informed her of H.H.'s death. The news caused Mrs. P. to suffer a mental breakdown, as confirmed by the June 10, 1986 letter of her minister, the June 11, 1986 letter of Rolf F. Amundsen, M. Div., and the medical report of James Lacey, M.D., Beaumont Clinic, all of Green Bay, Wisconsin. Her mental condition was later diagnosed on May 13, 1986 by Koti Mannem, M. D.

Psychiatry as "Adjustment Disorder With Depressed Mood" (D.S.M. III # 309.00). Mrs. P. played no role in the return of the children to Wisconsin following H.H.'s death, except to initially pass on the information concerning the whereabouts of the children in California to her son-in-law, J.K., on February 24, 1986.

18. On February 24, 1986, J.K., the uncle of the two minor children, was advised by Mrs. P. of the phone numbers of Santa Clara County Police Officer James Warburton and Santa Clara County, California Social Worker Ed Hill. Mr. K. telephoned Mr. Ed Hill and was informed that a hearing concerning the children was to be held in Santa Clara County on Wednesday, February 26, 1986 at 9:30 a.m. On February 24th, Mr. K. in telephone conversations with Social Worker Hill, Officer Warburton, and Lt. Commander Mardula of the U. S. Navy, inquired of such persons whether they or anyone else had any information identifying the fathers of the two minor children. Nobody had any such information. H.H.'s siblings and their husbands had never been informed by H.H. or anyone else of C.C. specifically, or that anyone knew the identity of the putative fathers of the two minor children. In fact, H.H.'s siblings and their husbands had been advised by H.H. that she had not named any putative father on either of the birth certificates of the two minor children.

19. H.H.'s siblings and their husbands were ignorant of the fact that C.C. claimed to be the putative father of A.E.H. That C.C. was named as the father on the birth certificate of A.E.H., and that E.N. was named as the father of N.J.H. on N.J.H.'s birth certificate was not known by H.H.'s siblings [sic] and their husbands until the following events occurred: First on March 14, 1986,

Lt. Commander Mardula at the U. S. Naval Base in Santa Clara County informed P.C. by telephone that a person named "C.C." was in his office claiming to be the father of A.E.H.; and Second, on March 19, 1986, pursuant to a telephone request made by P.C. of the Recorder of San Diego County, California, said Recorder mailed to P.C. certified copies of the birth certificates of both children.

20. On February 26, 1986, the Juvenile Court of the Superior Court of the State of California in and for the County of Santa Clara, in behalf of A.E.H., Petition No. 90565, and in behalf of N.J.H., Petition No. 90566, by the Honorable Kristine Mackin McCarthy, Referee of the Juvenile Court, released both children to their uncle, J.K., with the understanding that J.K. would be returning to Wisconsin with the children and that the State of Wisconsin would be taking jurisdiction of the two children. Appearing at said hearing on February 26, 1986 were J.K., and a Naval officer, in addition to District Attorney D. Soares. C.C. and E.N. did not receive notice of said hearing and did not appear. There was no conspiracy engaged in by the members of H.H.'s family to deny notice of the February 26, 1986 Juvenile Court hearing in Santa Clara County to C.C., E.N. or any other alleged putative father of either A.E.H. or N.J.H. The members of H.H.'s family could not have, with due diligence, given notice of the proceedings in Juvenile Court in Santa Clara County, California to C.C., E.N. or any other alleged putative father of the [sic] either A.E.H. or N.J.H. The proceedings in the Juvenile Court of Santa Clara County were emergency in nature because of the age of the children; the death of their mother, H.H., the sole known parent and

nuturer [sic] of the children; and the temporary placement of the children in separate foster homes, staffed by persons previously unknown to the children.

21. The military authorities, the United States Navy, also, formally released the children to J.K. by a Travel Order dated February 26, 1986 authorizing him to escort the two children back to Green Bay, Wisconsin on or before Febraury [sic] 28, 1986.

22. The United States Navy Record of Emergency Information prepared on February 22, 1985 by H.H., listing the names of persons to be contacted in the event of an emergency, does not list the name of C.C. or any other alleged putative father of the children.

23. On February 26, 1986, J.K. returned to Wisconsin with A.E.H. and N.J.H.

24. The Last Will and Testament of H.H. nominates the petitioners, P.C. and J.H. to be the guardians of her minor children.

25. Since February 26, 1986, both A.E.H. and N.J.H. have, for the past four months resided with their aunt and uncle, the petitioners, J.H. and P.C. The petitioners have provided for said children a healthy and happy home. The farm is an especially healthy environment for both A.E.H. and N.J.H. Both children have adjusted very well to life on the farm with their aunt and uncle in the Town of Lima, Rock County, Wisconsin and appear in fact to be thriving. Both children have been able to renew their acquaintance with their first cousin E.; and now both A.E.H. and N.J.H. have a very close, almost daily,

connection with their aunt and uncle, Mr. & Mrs. J.K., and B., age 4 and E., age 3 months.

26. Both A.E.H. and N.J.H. were diagnosed by a clinical child psychologist, Sandra Eisemann, Ph.D., shortly after their return to Wisconsin, as having special psychological needs. N.J.H. was diagnosed as having a speech and language disorder, and an Adjustment Reaction With Mixed Emotional Mood. A.E.H., also, was diagnosed as having an Adjustment Reaction With Mixed Emotional Mood. Both children continue to receive psychological counseling from Dr. Eisemann. N.J.H., for his speech problem, sees Lawrence J. Ketterman, Speech and Language Clinician of the Whitewater Unified School District, Whitewater, Wisconsin.

27. On March 17, 1986 J.H. and P.C. filed the Petition for Guardianship in the above entitled action, asking that letters of guardianship be issued to them as guardians of the persons and estates of N.J.H. and A.E.H. On March 17, 1986, the above court assumed jurisdiction over N.J.H. and A.E.H. and appointed the petitioners, P.C. and J.H., as temporary guardians of N.J.H. and A.E.H., and entered an order for hearing the petition for guardianship on May 6, 1986 at 11:00 a.m. On March 25, 1986, notice of the hearing for said petition for guardianship was served by mail upon Ms. T.T., Ms. S.K., E.N., C.C., M.P., J.H., Jr., as appears by the Affidavit of Mailing on file in the above entitled action, the June 3, 1986 Affidavit of C.C. admitting service, the April 18, 1986 brief of B. Jean Gassner, Attorney for C.C., acknowledging that C.C. was served by mail at his home, and the Certificate of Service of the United States Navy on E.N. on file in the above action. A copy of the said order for

hearing was also served personally upon J.H., Sr., as appears by the Certificate of Service on file herein. On April 7, 1986, Sandra Lang of the San Bernadino County, California Sheriff's Department was unable to personally serve said Order for Hearing on C.C. at the address of 1398 North 5th Avenue, Apartment 8, Upland, California for the reason that she was informed that said C.C. had not lived at said address for at least four (4) years, that he had moved and that no new address could be found. Said Certificate of the San Bernadino County Sheriff's Department is on file in the above action. The address at which said Sandra Lang attempted personal service on said C.C. was the same address that said C.C. had given to the military and police authorities on March 14, 1986, when he inquired at Santa Clara County of the whereabouts of A.E.H. On April 2, 9, 16, 1986, notice to unknown putative fathers of N.J.H. and A.E.H. of the Order for Hearing, Petition for Guardianship was published in the San Diego Daily Transcript, a newspaper of general circulation published in San Diego, San Diego County, California, as appears by the Certificate on file in the above action.

28. On April 1, 1986, C.C. filed in the Superior Court of the State of California for the County of San Bernardino, West District, Ontario, California, Case No. OCV 38045 seeking determination of the paternity of A.E.H.

29. On April 14, 1986, the Circuit Court of Rock County executed a notice under Section 6 UCCJA informing said Superior Court of California for San Bernadino County that the Circuit Court of Rock County, Wisconsin had assumed jurisdiction over said minor children,

appointed P.C. and J.H. as temporary guardians and entered an Order for Hearing Petition for Guardianship on May 6, 1986 at 11:00 a.m.; and advised said Superior Court to stay proceedings pending determination of the appropriate forum for the determination of the child custody issue. Said notice was then mailed to said Superior Court.

30. Subsequently, said C.C. commenced another action in the Superior Court of California for San Bernardino County, West District, Ontario, California for guardianship of the person of N.J.H., Case No. GW 865. The original petition for guardianship filed in Case No. GW 865, listed the putative father of N.J.H. as unknown, although E.N. is named as the father on the birth certificate on file in San Diego County, California.

31. Neither N.J.H. nor A.E.H. have ever resided in San Bernadino County, California.

32. C.C. is named on A.E.H.'s birth certificate as the putative father. C.C., however, has never resided with A.E.H. or exercised any control or custody over A.E.H. C.C. has never contributed in any material way to the support of A.E.H. C.C. does not claim to be the putative father of N.J.H. During A.E.H.'s life, C.C., has, at best, been only an occasional visitor of A.E.H. C.C.'s Section 9 UCCJA Declaration of past addresses where A.E.H. has lived in the past 5 years shows an incomplete knowledge of where A.E.H. has lived. Said Declaration was part of C.C.'s original papers filed in Case OCV 38045 in San Bernardino County. During the two and one-half year period of A.E.H.'s life before the death of A.E.H.'s mother, C.C. never commenced a paternity action to

establish any claim of legal rights to A.E.H. During the period of time that A.E.H. and N.J.H. lived with the maternal grandfather in Macon, Missouri from May, 1984 through May, 1985, C.C. never attempted to make contact with said children, nor did he during that period remember A.E.H.'s birthday or Christmas. C.C. never made known his claim of paternity to the United States Naval authorities; nor did he ever request of such U. S. Naval authorities notice in the event of an emergency concerning A.E.H. or N.J.H. C.C. does not have an intimate relationship with either A.E.H. or N.J.H. After N.J.H. and A.E.H. returned in May of 1985 to Santa Clara County, California, C.C. continued to live more than 400 miles away in San Bernadino County, California. It was not generally known in the Santa Clara County area that C.C. claimed to be the father of A.E.H. A Murder investigation was undertaken concerning the death of H.H. and the Police and Military authorities never discovered C.C.'s existence until C.C. inquired about the death himself more than 2-1/2 weeks later.

33. E.N. has never been adjudged to be the father of N.J.H. E.N. has never commenced a paternity action to establish his legal rights to N.J.H. E.N. has never contributed to the support of N.J.H. E.N. has never visited or established a relationship with N.J.H.

CONCLUSIONS OF LAW

1. Notice and opportunity to be heard was given under Sec. 822.04, .05, Wisconsin Statutes, Sections 4 and 5 UCCJ [sic] in a manner reasonably calculated to give

actual notice to all persons entitled to be heard including Mrs. M.P.P., 1331 Belleuve [sic] Lohist Street, Lot 510, Green Bay, Wisconsin 54302, Mrs. T.T., 10582 East Keystone Road, Tuscon [sic], Arizona 85730, Mrs. S.K., 239 Jefferson Street, Whitewater, Wisconsin 53190, C.C., 1378 North 5th, #8, Upland, California 91786, J.H., Sr., 1020 Valleyview Court, Macon, Missouri 63552, J.H., Jr., 1331 Belleuve [sic] Lohist Street, Lot 510, Green Bay, Wisconsin 54302, and E.N., MM1, Trident Refit Facility Bangor, Bremerton, Washington 98315-5300, as appears by the Proofs of Service on file herein; and the court has jurisdiction over such persons for the purpose of making a decree of jurisdiction and convenient forum under the Uniform Child Custody Jurisdiction Act.

2. The Probate Branch of the Rock County, Wisconsin Circuit Court is competent under Sec. 880.02, Wisconsin Statutes to decide the custody of the above minor children under the petition in the above action, and has jurisdiction under Sec. 822.03(1)(b) (c) and (d) of the Wisconsin Statutes, Section 3(a) (2) (3) and (4) UCCJA to make the child custody determination of both of the above named minor children by initial decree, for the following reasons:

a. Under Section 822.03 (1)(b), Wisconsin Statutes, Section 3 (a) (2) UCCJA it is in the best interest of the child that a court of the State of Wisconsin assume jurisdiction because both children and the contestants, P.C. and J.H., have significant connections with the State of Wisconsin.

The petitioners, P.C. and J.H., both are contestants. They are residents of Rock County, taxpayers and farmers in the Town of Lima, Rock County, Wisconsin.

The said minor children have significant connections with the State of Wisconsin for the following reasons: their mother, H.H., was born, raised and educated in the State of Wisconsin. The mother is now buried in Wisconsin. The mother, as a Seaman in the United States Navy, and said minor children were living in California, not necessarily by choice, but because the mother was stationed in California by the Navy. Her length of stay in California depended not on her intent to establish residency, but on the duty assignment given to her by the Navy. Evidence of the lack of permanency of residency is the year of residency of the minor children in the State of Missouri, a Midwestern state, from May, 1984 to May, 1985, the period when the mother was assigned to on-ship duty with the U.S.S. Ajax.

All of the minor children's aunts and uncles reside in Wisconsin, except for T.T. and her husband, who live in Tuscon [sic], Arizona (Mrs. T. is also in the military service). Said minor children have, in addition to the petitioners, another aunt and uncle, Mr. & Mrs. J.K., who live in Whitewater, Wisconsin. The minor children have two young cousins who also live in Whitewater, Wisconsin. The maternal grandmother lives in Green Bay, Wisconsin, and the maternal grandfather lives in the Midwest in Macon, Missouri.

Both children have lived for a substantial part of their life in the Midwest and Wisconsin. A.E.H. has spent almost one-half of her life in the Midwest. Both of said minor children were previously familiar with the home and farm of the petitioners in the Town of Lima, Rock County. Both of said minor children now having spent the last three and one-half months living on said farm

identify it as their home. For each of said minor children, the only known legal relative from their immediate family now resides in Wisconsin (for A.E.H. her only known relative from her immediate family is N.J.H., and vice versa). Both said minor children enjoy a close kinship and friendship with their first cousins, B., age 4, and E., age 3 months, in Whitewater, Wisconsin.

b. Under Section 822.03 (1)(b), Section 3 (a)(2) UCCJA, it is in the best interest of both children that a court of the State of Wisconsin assume jurisdiction because there is available in this state substantial evidence concerning the present and future care, protection, training, and personal relationships of said minor children, to wit: said minor children have resided continuously on the petitioners' farm in the Town of Lima, Rock County, Wisconsin since February 26, 1986; both children have been diagnosed to have special psychological problems following the tragic death of their mother on February 23, 1986. Both children have been diagnosed as having a "Adjustment Reaction With Mixed Emotional Mood". Both children have received and continue to receive psychological counseling from Sandra Eisemann, Ph.D. of Fort Atkinson and Madison, Wisconsin. N.J.H., in addition has a speech problem, which was diagnosed by Lawrence J. Ketterman, Speech and Language Clinician of the Whitewater Unified School District, and has received and continues to receive counseling from Mr. Ketterman concerning such speech problem. Both minor children have enjoyed and continue to enjoy a close friendship and relationship with their aunts, uncles, and first cousins in the Whitewater, Wisconsin area.

There has been adduced little or no evidence concerning persons in the community in Santa Clara County, California, where the children were living at the time of their mother's death, who might provide protection, training or personal relationships for said minor children. Said C.C. lives in San Bernadino County, California, some 400 miles distant from Santa Clara County, California. C.C. has never been adjudged to be the father of either minor child. C.C. claims not to be the father of N.J.H. C.C. was never married to H.H., the mother of the minor children. C.C. never resided with either the said mother or said minor children. C.C. never had custody of either of said minor children. C.C. has never contributed in any substantial way to the support of either of said minor children. C.C. was only an occasional visitor to A.E.H.

c. Under Section 822.03(1)(c), Wisconsin Statutes Section 3(a)(3) UCCJA, both children are physically present in the State of Wisconsin, and both children were abandoned in the State of California by the death of their mother, H.H., on February 23, 1986; said H.H. being their sole custodian and nurturer. At the time of the death of H.H., the United States Navy, and the civilian authorities in Santa Clara County, California knew of no persons other than the deceased mother's relatives in the Midwest to contact concerning the children. C.C. had never made known to either the United States Navy or the civilian authorities in Santa Clara County, California, his claim of paternity to A.E.H., and his wish to be notified in the event of an emergency concerning either her or N.J.H.

d. Under 822.03(1)(c), Wisconsin Statutes, Section 3(a)(3) UCCJA, both minor children are physically in

Wisconsin and were returned here under emergency circumstances [sic], and it is necessary because of such emergency circumstances to protect both children, because both children are otherwise neglected and dependent to wit: both children having been living in Wisconsin since February 26, 1986; their only known living parent, their mother, is dead; prior to the mother's death, she was the only custodian and nurturer [sic] of said minor children; there is no known adjudicated living parent of either said minor children; and both children, because of their ages, N.J.H., age 4, and A.E.H., age 2, would, unless the State of Wisconsin takes jurisdiction, be in neglected, dependent and necessitous [sic] circumstances.

e. The Probate Branch of Rock County, Wisconsin Circuit Court, further, has jurisdiction to make a child custody determination concerning said minor children, under Section 822.03(1)(d), Wisconsin Statutes, Section 3(a)(4) UCCJA, because the Superior Court of California for the County of Santa Clara, declined to exercise jurisdiction over said minor children, releasing said minor children after a hearing on February 26, 1986, to their uncle J.K. of Whitewater, Wisconsin for return to the State of Wisconsin, with the understanding that the State of Wisconsin would assume jurisdiction over the children; and for the reason that it is in the best interest of the minor children that the Circuit Court of Rock County, Wisconsin assume jurisdiction for the reasons stated above, and the reason that said minor children have adjusted very well to their new home on the farm in the Town of Lima, Rock County, Wisconsin, and in fact are thriving in the rural environment of their Lima Township home.

3. Under Section 822.06, Wisconsin Statutes, Section 6 UCCJA, the Probate Branch of the Circuit Court of Rock County, Wisconsin is the appropriate forum to exercise jurisdiction and make the child custody determination with respect to the said minor children, and inappropriate for the West District of Superior Court of California for the County of Bernadino to assume jurisdiction and make such child custody determination for the following reasons:

a. The above Petition for Guardianship of said minor children was filed in Rock County, Wisconsin on March 17, 1986, two weeks before C.C. filed an action for the determination of paternity of A.E.H., and more than two weeks before C.C. filed an action for guardianship of N.J.H., in the West District of the Superior Court of California for San Bernadino County;

b. At the time said actions were commenced in San Bernardino County, California, the Probate Branch of the Rock County, Wisconsin Circuit Court for the reasons stated above, was exercising jurisdiction substantially in conformity with the Uniform Child Custody Jurisdiction Act, having on March 17, 1986 appointed P.C. and J.H., the petitioners, temporary guardians of the persons and estates of said minor children; and

c. The State of Wisconsin, and more specifically, the Probate Branch of the Rock County Circuit Court, is a more appropriate forum than the West District Superior Court of California for San Bernadino County for the following reasons: both minor children have now resided in Wisconsin continuously for the last three and one-half months; the children have adjusted very well to life on

the Lima Township, Rock County, Wisconsin farm, have a very close, loving and stable relationship with their aunt and uncle, P.C. and J.H.; the minor children, in fact, are thriving with the life on the farm; the children have need of professional psychological assistance, and their aunt and uncle have obtained the same for the children; almost all of the family relationships of the minor children are in the State of Wisconsin; C.C. has never been adjudicated to be the father of either of said children and claims to be father of only A.E.H.; C.C. has been only an occasional visitor of A.E.H.; to again uproot the said children and transport them approximately two thousand miles to a completely strange environment (San Bernadino County being some four hundred miles from Santa Clara County, their former home) would expose them to unknown psychological trauma; and substantial evidence concerning the present and future care, protection, training and personal relationships of both of said children as stated above, is more readily available in the State of Wisconsin.

4. The Probate Branch of Rock County Circuit Court, Wisconsin should not decline jurisdiction by reason of conduct under Section 822.08, Wisconsin Statutes, Section 8 UCCJA, for the following reasons:

a. Both children were released to their uncle J.K. by both the Juvenile Court of the Superior Court of California for Santa Clara County and the United States Navy on February 26, 1986, after a hearing in the said Juvenile Court, for return to Wisconsin by their uncle J.K. with the understanding that the State of Wisconsin would take jurisdiction over said children.

b. C.C. never received notice of the hearing on February 26, 1986 in the Juvenile Court of the Superior Court of California for Santa Clara County because of his own fault in having failed for more than two and one-half years to:

1. Contribute, in any material way to the support of A.E.H., his claimed child;

2. Commence a paternity action to establish legal parental rights to A.E.H.;

3. Make his claim of paternity over A.E.H. known to the military authorities and known generally in the community where A.E.H. was residing at the time of her Mother's death; or

4. Attempt to make contact with the said minor children during the period of May, 1984 through May, 1985, when the children were living with the maternal relatives in the Midwest; and when he could have made generally known to all of the maternal relatives, not merely the paternal grandmother, his claim of paternity of A.E.H.

c. C.C. was not denied due process of law when he did not receive notice and an opportunity to be heard before the Juvenile Court of the Superior Court in Santa Clara County on February 26, 1986, because he has failed to show the [sic] his interest in A.E.H. had acquired substantial protection under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, to wit: C.C.'s affidavits do not show that he had made a full committment [sic] to A.E.H. His affidavits fail to show the type of emotional attachment to either of said children that derives from the intimacy of

daily association, and from the role it plays in promoting a way of life through the instruction of said children. Instead, his affidavits show him to be only an occasional visitor, who for more than one year from May, 1984 to May, 1985 attempted to make no contact with either of said children. C.C. made no full committment [sic] to the responsibilities of parenthood. He never contributed in any substantial manner to the support or rearing of either of said children.

d. C.C. could not have been served with notice of said Juvenile hearing before the Superior Court in Santa Clara County, which hearing was emergency in nature and time was of the essence, even if C.C.'s claim of paternity had been known to the participants at said hearing, because the Sheriff's Department of San Bernadino County, California, on April 7, 1986, when attempting to service said C.C. with process, at an address which said C.C. has given as his home address to Lt. Commander Mardula at the United States Naval Base in Santa Clara County on March 14, 1986; said Sheriff's Department being advised he had not lived there for 4 years and his whereabouts were unknown; and because the whereabouts of C.C. could not have been ascertained with due diligence on short notice; and because publication of notice would not have been practicable.

e. The maternal relatives of said minor children did not engage in any conspiracy to deny C.C. notice and an opportunity to be heard before the Juvenile Court of the Superior Court in Santa Clara County. The maternal relatives who participated in the return of the children to Wisconsin were totally ignorant of the existence of C.C.

The only maternal relative who was aware of the existence of C.C. was the maternal grandmother, Mrs. M.P.P., who did not participate in the return of the children to Wisconsin, other than to give the information concerning their whereabouts to their uncle J.K. M.P.P., the maternal grandmother suffered a mental breakdown upon learning of the tragic death of her daughter, H.H., and was not capable of participating in any conspiracy, and did not participate in any conspiracy to deny C.C. any rights which he might have with respect to said minor children.

e. [sic] The conduct of the maternal relatives in acting with dispatch to assist the said minor children in California was not reprehensible. Instead, the dispatch with which they acted showed their love and concern for the children at a time of great crisis for the children. The maternal relatives are to be commended, not condemned for the manner in which they took care of the children in California and subsequently in Wisconsin following the death of the mother.

DECREE

Upon the foregoing Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the Probate Branch of the Rock County, Wisconsin Circuit Court has and does hereby take jurisdiction to make the child custody determination concerning said minor children in the above entitled action, and
2. That the actions commenced by C.C., pending in the West District, Superior Court of California in and for

San Bernadino County, entitled C.C., Plaintiff vs. Estate of H.H., et al., Case No. OCV 38045, and Guardianship of the Person of N.J.H., Case No. GW 865, be and the same is are [sic] hereby stayed; and the West District, Superior Court of California in San Bernadino County be and it hereby is directed to cease taking any further action in said cases.

Dated at Janesville, Wisconsin this

3rd day of July, 1986.

Nun [sic] Pro Tunc June 17, 1986

BY THE COURT:

/s/ John H. Lussow

Honorable John H. Lussow,
Circuit Judge

EXCERPT OF TRANSCRIPT OF PROCEEDINGS,

Case No. 86-TR-71, on May 14, 1987, page 91.

Direct by Attorney Welker of C.C.

* * *

BY MR. WELKER:

Q During that, um, um, period of time after H.H. became pregnant, did your living circumstances change?

A Yes, I moved to Texas.

Q And why was that?

A I got - I was discharged from the Navy and - in February, and I moved to Dallas to start a new job.

EXCERPT OF TRANSCRIPT OF PROCEEDINGS,

Case No. 86-TR-71, on May 14, 1987, page 113.

Direct by Attorney Welker of C.C.

* * *

Q Now, at some point along the way you were married, were you not?

A Yes, I was.

Q And when was that approximately?

* * *

A February of '84.

BY MR. WELKER:

Q All right. In February of 1984, you were married. What was your wife's name?

* * *

EXCERPT OF TRANSCRIPT OF PROCEEDINGS,

Case No. 86-TR-71, on May 14, 1987, page 138. —

Direct by Attorney Welker of C.C.

Q Now, as a result of those inquiries, what did you find out concerning the whereabouts of your children?

A That they were in Wisconsin.

* * *

EXCERPT OF TRANSCRIPT OF PROCEEDINGS,

Case No. 86-TR-71, on May 16, 1987, page 16.

Cross-Examination by Attorney Kelly of C.C.

* * *

Q No. Excuse me. It's your -- it's your testimony that on one occasion H.H. did ask for support?

A Yes, one time.

Q And you turned her down saying that, um, you had new family obligations?

A I was just married, and my wife was in the room and we were having problems, yes.

EXCERPT OF TRANSCRIPT OF PROCEEDINGS,

Case No. 86-TR-71, on May 16, 1987, page 161.

Attorney Dillon's closing argument.

* * *

Mr. C.C. had reason to believe H.H. was afraid of Mr. B. He had reason to believe that those children were in a dangerous situation living there with Mr. B. There would have been a lot of things he could have done. He could have sought some sort of protective order. He could have talked to her. He could have helped her out financially. Nothing. He had a golden opportunity to take care of A.E.H. when mom went out to sea for a year. What did he do? Nothing. He knew she was leaving. Mr. C.C., I think it could be said of him, has done what he felt like doing with respect to these children, particularly A.E.H., and in a fashion that I think is unbecoming to Mr. C.C., he blames other people for what he has failed to do. Grandpa H. didn't give him an address; and therefore, it was Grandpa H.'s fault, Opa (Phon.) that he didn't talk to, didn't have any contact at all with A.E.H. for 14 months, that was Grandpa's fault.

* * *

MR. DILLON: His wife was jealous. So during that period of time when he had very little to do with this child, it was her fault. And H.H. herself, it was her fault because H.H. was too proud to accept money from him.

* * *
